House of the Good Samaritan and Samaritan Keep Nursing Home and Licensed Practical Nurses and Technicians of New York, Inc., Local 721, S.E.I.U., AFL-CIO. Cases 3-CA-10562, 3-CA-10691, 3-CA-10888-1, and 3-CA-10946

8 November 1983

DECISION AND ORDER

By Chairman Dotson and Members ZIMMERMAN AND HUNTER

On 25 April 1983 Administrative Law Judge Wallace H. Nations issued the attached decision. The General Counsel filed exceptions and a supporting brief, the Union filed exceptions and adopted the General Counsel's brief, and the Respondent filed an answering brief and cross-exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, ¹ and conclusions² and to adopt the recommended Order.

ORDER

The recommended Order of the administrative law judge is adopted and the complaint is dismissed.

¹ The judge incorrectly stated in his decision that the Respondent's service and maintenance employees are represented in a separate unit by Local 200 of the Service Employees International Union. The record shows that Local 200 received a majority of the ballots cast in an election among service and maintenance employees on 14 April 1982, the election was set aside, and another election had been scheduled but had not taken place at the time of the hearing. We correct this inadvertent error of the judge.

² The General Counsel has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. Standard Dry Wall Products, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

DECISION

STATEMENT OF THE CASE

WALLACE H. NATIONS, Administrative Law Judge: Based on charges brought by Licensed Practical Nurses and Technicians of New York, Inc., Local 721, S.E.I.U., AFL-CIO (the Union), a series of complaints issued beginning on August 27, 1981, against House of the Good Samaritan and Samaritan Keep Nursing Home (the Respondent). The various complaints, under the documents noted above, alleged a number of violations of Section 8(a)(1), (3), (4), and (5) of the Act. On May 6, 1982, an order issued further consolidating cases and amending the consolidated complaints alleging additional violations

of the Act. On July 21 and 22, 1982, a hearing was held on these matters at Watertown, New York.

Prior to the completion of the hearing, the parties reached a settlement of the 8(a)(1), (3), and (4) allegations in the amended consolidated complaint with respect to Donna M. (Johnston) Gregory, subject to the approval of the Respondent's board of directors. Thereafter, acting on a motion of the General Counsel, I issued an order withdrawing the 8(a)(1), (3), and (4) allegations with respect to Donna Gregory.

On January 4, 1983, the General Counsel filed a motion to withdraw all of the remaining allegations of the consolidated complaint except the one in paragraph 14(e). This paragraph alleges that the Respondent unilaterally required bargaining unit employees to pay part of their health insurance premiums. As the motion of the General Counsel reflects that the parties have reached a collective-bargaining agreement and the Charging Party has requested that the motion be granted, the motion of the General Counsel, dated January 4, 1983, is hereby granted.

Briefs were received on or about January 10, 1983, relating to the sole remaining issue to be determined.

On the entire record in this case and my observation of the witnesses and their demeanor, I make the following

FINDINGS AND CONCLUSIONS

I. THE BUSINESS OF THE RESPONDENT

The Respondent is a New York corporation maintaining its principal office and place of business at Watertown, New York, where it has at all times material herein, continuously engaged in the business of providing and performing health care and related services. Annually, the Respondent, in the course and conduct of its health care operations, received gross revenues in excess of \$250,000. During this same period of time, the Respondent received goods and supplies at its Watertown facility valued in excess of \$1,000, which goods and supplies are shipped to said facility directly from States other than the State of New York. The Respondent admits, and I find, that it is and has been at all times material herein an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. I further find that it will effectuate the policies of the Act to assert jurisdiction in this case.

II. THE LABOR ORGANIZATION

The Licensed Practical Nurses and Technicians of New York, Inc., Local 721, S.E.I.U., AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. Background Facts

On May 7, 1981, the Union was certified by the Board to represent a unit of technical employees excluding licensed practical nurses at the Respondent's hospital and nursing home. The Union also represents the Respond-

ent's LPNs in a separate unit. The Respondent's service and maintenance employees are also represented in a separate unit by Service Employees International Union, Local 200. The Respondent's registered nurses are represented in a separate unit by New York State Nurses Association and the other employees are unrepresented.

During the summer of 1981, negotiations for an initial contract commenced and the parties negotiated thereafter on a regular basis, including negotiations on the subject of health insurance. The Respondent's negotiators believed that tentative agreement on the subject had been reached by the year's end, but that point was contested by the Union's negotiator.

The Respondent's practice with respect to unrepresented employees under its employee's manual was to pay the entire cost of health insurance under a group health policy in which the employees could enroll. The policy manual had a dollar maximum amount of contributions that the Respondent would make but this dollar amount was evidently equal to or exceeded the actual premiums, so the employees paid nothing.

On or about December 23, 1981, the Respondent was notified by its insurance carrier that the premium rate for its employees would increase significantly in January 1982. In response to this notice, the Respondent took two material actions. First, it revised its policy manual to reflect a greater ceiling for which the company would pay for unrepresented employees, which ceiling either equaled or exceeded the total premiums due from the employees. This had the effect of not requiring unrepresented employees to pay any portion for their insurance premium. Second, by letter dated January 14, 1982, the Respondent advised its technical employees in the involved bargaining unit that they were required to pay the increased premiums to the extent that they exceeded the limit set out in the employee manual as existed on the day of certification of the bargaining unit, May 7, 1981. A copy of this letter was not sent to the Union.

The representative of the Union, Catherine Ventiquattro, learned about the change in premium rates when employees began to complain to her about the January 14 letter.¹

On January 18, Ventiquattro went to management and complained about the failure to be notified and about the decision to pass the increase in premiums on to the bargaining unit employees. She also complained about the amount of the premium increase as it was increased to the same level as that called for by the contract between the Respondent and the LPNs, whereas the rate for the technical employees was governed by the Respondent's policy and past practice. The Respondent agreed to send a letter dated January 18 to the technical bargaining unit

members stating the corrected rate of increase. A copy of this leter was not sent to the Union either.

B. Anaylsis and Conclusions

It is settled that once a bargaining relationship has been established the employer may not alter something which is a mandatory subject of bargaining as defined in Section 8(d) (wages, hours, and other terms and conditions of employment) without first giving the union an opportunity to bargain about the contemplated change. To change unilaterally an item which is a mandatory subject of bargaining under Section 8(d) is legally tantamount to a refusal to bargain.

It follows, of course, that the company does not violate Section 8(a)(5) in this respect where there has, in fact, been no change in the status quo, or the change does not relate to a mandatory subject of bargaining. There is no serious issue in this proceeding about a refusal to bargain on the part of the Respondent as bargaining on the health cost issue had been continuing since the unit was certified and continued after the Respondent's action in passing on the premium increase to employees in January 1982.

Perhaps more significantly, the parties, by agreement, had dropped all allegations with respect to bad-faith bargaining in this proceeding.

The matter in dispute is not one over which the Respondent had any real control, other than its response. The insurance carrier decided unilaterally to increase its premiums to the Respondent on short notice some 6 months after bargaining began. The decision on the part of the Respondent's insurance carrier put the Respondent in an unusual position. If it chose to pay the premium increase for its unrepresented employees and also for the employees in the bargaining unit, it could be accused of unilaterally changing the conditions of employment by granting a benefit to employees in the unit that it did not have prior to May 7, 1981. On the other hand, by adhering to its printed policy in effect as of May 7, 1981, and passing along the increased premium costs to the bargaining unit employees to the extent that exceeded the limits set in its policy manual, the Respondent is alleged to have unilaterally changed the conditions of employment.

What the Respondent was required by law to do was to maintain the status quo. I find the status quo, with respect to health insurance premiums, to be reflected by the terms of the Respondent's policy manual regarding health insurance as of May 7, 1981. There is insufficient evidence in this record to reflect that the Respondent had always covered increases in premiums for its unrepresented employees and made this practice consistent and inflexible. Absent such proof, I believe the Respondent was bound to adhere to the policy that was in effect as of May 7, 1981.

Accordingly, I find that the Respondent has not violated the Act by passing along the cost of the increased health insurance coverage to technical bargaining unit employees while choosing to pay the increase in premiums for its unrepresented employees. Inasmuch as the complaint no longer alleges other violations of the Act

¹ The Respondent's director of personnel, Thomas Pilgermayer, testified that he had a telephone conversation with Ventiquattro in late December 1981, during which he told her about the increased insurance premiums. Ventiquattro denied that she had ever been notified about the increase in health premiums in a conversation with Pilgermayer and noted that she was on vacation from December 22 or 23 until after the New Year weekend of about January 4, 1982. She did not leave a telephone number where she could be reached. Based on the demeanor of the witnesses, I credit Ventiquattro's denial that she had no knowledge of the increase until sometime on or after January 14.

by the Respondent, my order will provide for its dismissal.

On these findings of fact and the entire record in this case, I make the following

CONCLUSIONS OF LAW

- 1. The Respondent is an employer within the meaning of Section 2(2) of the Act and is engaged in commerce within the meaning of Section 2(6) and (7) of the Act.
- 2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
- 3. The Respondent did not engage in unfair labor practices within the meaning of Section 8(a)(1) or (5) of the Act by passing on to its bargaining unit employees in-

creased costs of health insurance premiums in January 1982.

On the foregoing findings of fact, conclusions of law, the entire record, and pursuant to Section 10(c) of the Act, as amended, I issue the following recommended

ORDER²

It is hereby ordered that the complaint be, and the same hereby is, dismissed.

² If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.